IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 604.

DIVISION 1287 of the AMALGAMATED ASSOCIATION of STREET, ELECTRIC RAILWAY and MOTOR COACH EMPLOYEES of AMERICA et al.,
Appellants,

vs.

STATE OF MISSOURI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI.

MOTION TO DISMISS THE APPEAL.

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Cases Cited

Other Authorities

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Pursuant to Rule 16 of this Court, appellee moves to dismiss the appeal on the ground that the appeal is not within the jurisdiction of this Court, the judgment below not being a final one, from which appeal is authorized, and on the further ground that the federal question sought to be reviewed was not expressly passed on below and may be rendered moot by further proceedings in the Circuit Court of Jackson County, Missouri, or by action of the Governor in terminating seizure.

STATEMENT

This is an appeal from a judgment of the Supreme Court of Missouri, sitting *en banc*, entered on October 8, 1962, modifying and affirming in part a decree of the Circuit Court of Jackson County, Missouri. The opinion of the Supreme Court of Missouri is now reported at 361 S.W.2d 33. The Circuit Court decree, entered on February 12, 1962, would have permanently enjoined appellants from "continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri" which had, pursuant to State law, taken over the operation of public transit facilities in Kansas City, Missouri.

The Missouri Supreme Court held that the act in question, the King-Thompson Act, Chapter 295, R.S.Mo. 1959, can only be invoked to safeguard the continuance of public utility services "in emergency situations. We must and do construe the term 'emergency' to imply a *temporary* situation and necessarily dependent upon the particular facts of the particular case under consideration. *Nor can we construe the Act as authorizing a permanent injunction* prohibiting defendants from striking against either the Company or the State and, therefore, the court should have retained jurisdiction of the cause, so that the equitable relief granted might be modified in accordance with changing conditions." Jurisdictional Statement, 32a. (emphasis supplied)

The Court continued (page 33a): "There is no contention here by the State, nor has this Court held that the total stoppage of the mass transportation system in Kansas City, after reasonable notice and an opportunity to the public to adjust to such a situation, would create a permanent

emergency situation entitling the State to a permanent injunction against a concerted stoppage of work, or authorizing the State to indefinitely operate the transportation system on the theory of protecting the citizens from disaster in an emergency situation. Nor does this Court expect to so hold. However, in this case, jeopardy to the public, within the meaning of the provisions of the Act and as construed by this Court, is now admitted by appellants to have existed at the time of the seizure and the entering of the judgment appealed from.

"If the emergency situation no longer in fact exists, appellants may apply to the court for a modification of the decree on terms, since it is not this Court's purpose or intention to hold that the mere total discontinuance of mass transportation services in Kansas City, Missouri, after reasonable notice to the public will necessarily create such an emergency or evidence such an impending disaster to public health, safety and welfare as to justify permanent injunctive relief under the King-Thompson Act."

Earlier in the opinion, the Court said (page 31a): "We find nothing in the Act to prevent appellants from making application to the Governor at any time for the release of the property of the utility upon reasonable notice and terms and any such release would relieve appellants from the particular judgment entered in this case. Further, as hereinafter mentioned, in the event of the denial of such relief appellants could apply to the trial court for a modification of the judgment theretofore entered."

Instead of seeking Circuit Court relief from the temporary restraint which the Missouri Supreme Court affirmed or seeking relief from the Governor as suggested, appellants seek review in this Court.

ARGUMENT.

Appellants rely upon 28 U.S.C., Section 1257, as authority for this appeal. Review under that statute is limited to "final judgments." It is settled that the Court is without jurisdiction to review State Court decisions affirming temporary injunctions. *Montgomery Bldg. & Const. Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178. The cited decision, like the case at bar, involved a temporary injunction against labor union activity, which the unions claimed to be beyond the reach of local authorities, by reason of the Taft-Hartley Act. Unlike the case at bar, the state appellate court opinion dealt with the merits in a way which offered no ground for hope that the defendants could be freed from the restraint, upon application to the trial court. Nevertheless, this Court rejected review without difficulty, stating (l.c. 180-181):

> "From the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees, such as is involved in this case * * * The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in Gibbons v. Ogden, supra. There is no room here for interpretation. The rule remains unchanged.
>
> "True, as long as a temporary injunction is in force it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here * * * "

In the case at bar, the portions of the opinion of the Missouri Supreme Court quoted above demonstrate that the restraint sustained is "temporary" in fact, as well as by label, and is therefore not susceptible of review under the limitations on appeal contained in the governing statute. Injunctive decrees under the King-Thompson Act are not permanent restraints, subject to modification upon unexpected or unpredictable changes in circumstances. They are based on emergency conditions which are temporary almost by definition. As suggested by the Missouri Supreme Court (p. 33a) the emergency feature of a transit strike may rest on such ephemeral factors as whether the public has "reasonable notice and an opportunity to adjust" to a prospective loss of service. The restraint in such a situation must fairly be considered temporary, and beyond the appellate jurisdiction of this Court. If State Court temporary injunctions in labor cases are deemed inconsistent with national labor policy, advocates of this view should seek amendment of the statute governing appeals to this Court, and should not ask the Court to reverse its settled interpretation of that statute.

Appellants recognize the question regarding finality of the judgment below, and seek to meet it in a footnote, Jurisdictional Statement, note 2, pages 13-14. They cite authorities in which permanent injunctions were granted, not rejected, as in the case at bar. They further aver that State Court litigation has reached a "definite stop," and "there is nothing more to be decided." If a "stop" has been reached in the State Courts, it is simply because appellants choose to allow the temporary injunction to continue unchallenged in the Circuit Court, in hopes of "making law" in this Court. They refuse to try either of the keys handed them by the Missouri Supreme Court. Contrary to appellants' assertion, there is a great deal more

to be decided, regarding the emergency requirements of Missouri law, as it applies to transit strikes. As in *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U.S. 62, 71, "the fate of the whole litigation may well be affected by the fate of the unresolved contingencies * * *."

In the proceeding below, the Supreme Court of Missouri did not adjudicate the validity of *present* restrictions on appellants' activities, under State or Federal law. All that was decided, partly in reliance on appellants' concession (Jurisdictional Statement, pages 17a-19a, 33a) was that an emergency, under State law, existed at the time of seizure and when the temporary injunction was entered. Whether there now exists in Kansas City an emergency situation which permits present limitation on appellants' right to strike, under Missouri law, is an issue which has not been decided, but is expressly left in doubt by the decision of the Missouri Supreme Court. Neither the Governor, the Circuit Court nor the Supreme Court of Missouri has passed on this question.

Apart from the issue of finality, appellants' effort to "make law" in this case runs aground because their avoidance of the Circuit Court as a forum for determining the validity of present restraints necessarily destroys the concrete nature of the questions presented. Appellants urge the abstract invalidity of the King-Thompson Act, and are unwilling to litigate a concrete set of facts from which it could be determined whether a local emergency now exists. Their effort to overthrow the King Thompson Act, under the Supremacy Clause, fails to tender "the underlying constitutional issues in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts." Therefore, the appeal

should be dismissed. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584-5. See *Government and Civic Employees Organizing Committee, CIO*, v. *Windsor*, 353 U.S. 364.

FEDERAL QUESTIONS ARE SUBSTANTIAL.

Appellants have written a lengthy Jurisdictional Statement in the purported belief "that this Court may wish to consider summary reversal of the judgment." Jurisdictional Statement, pages 25-26. Rather than leave the merits completely untouched at this time, appellee deems it appropriate to note its conclusion that the Federal questions, on both sides of this case, are substantial. Three members of this Court have indicated at least a preliminary view that the Missouri act in question is invalid, in whole or in part. *Local 8-6 Oil, Chemical & Atomic Workers Union* v. *Missouri*, 361 U.S. 363. The Missouri Supreme Court *en banc* has adopted well-reasoned opinions sustaining certain actions under the act. *Missouri* v. *Local 8-6 Oil, Chemical & Atomic Workers Union*, 317 S.W.2d 309; *Missouri* v. *Division 1287, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America*, pages 3a-44a, Jurisdictional Statement. Nothing has occurred since the writing of the latter opinion to upset its validity, and due deference to the Courts by advocates would seem to require the conclusion that the Federal questions are truly substantial.

Appellants place primary reliance on legal implications which they say flow from the decision in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 998*, v. *Wisconsin Employment Relations Board*, 340 U.S. 383. As noted, the Missouri Supreme Court has twice set forth what it believed to be controlling distinctions between that case and cases

under the King-Thompson Act. In the case at bar, the Court stated an important consideration, based on the injunction granted which is limited to prohibition against striking against the State of Missouri during State-operation of the transit system. This invokes the exception to the Federal act, defining "employer" so it does not apply to a State. 29 U.S.C., Section 152(2). Appellants respond with argument that State-operation is "technical" or "nominal". They also assert that preemption occurs even though utility company employees become State employees, from all standpoints—a contention directly contrary to the cited section of the act. If appellants are wrong in this latter contention, there remains a substantial question whether national labor policy is promoted by forcing a State to expand an emergency seizure of a public utility into a deeply entrenched relationship with utility workers, before coping with labor strife which can cripple a community.

Regarding a basic distinction between the invalid Wisconsin legislation and legislation directed toward resolving a local emergency, appellants must not only convict the Missouri Supreme Court of error but must also attribute identical error to as knowledgeable an expert on Federal labor law as the former Senator from Massachusetts, now President of the United States. In debating the so-called Holland amendment, Senator John F. Kennedy argued that it was unnecessary, because "the (State) courts have the power to act in cases in which the health, safety and basic welfare of the citizens of the State are at stake. The courts have been given by the States the power to seize industries to protect the public health and safety." 105 Cong. Rec. 6740. Senator Kennedy distinguished "true emergencies" from a particular transit strike, in Florida, which he treated as merely a matter

of "inconvenience." If Senator Kennedy is right, pre-emption turns on analysis by the Courts of the local emergency. The Federal issue thus is very close to the State law issue which appellants seek to avoid, when they ignore the Missouri Supreme Court's invitation to contend before the Governor or in the Circuit Court that there is no emergency requiring State seizure.

It is respectfully submitted appellants should avail themselves of the substantial remedies pointed out to them by the Supreme Court of Missouri and until they exhaust these remedies their appeal is premature, and should be dismissed.

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Assistant Attorney General of Missouri,
JOHN C. BAUMANN,
Assistant Attorney General of Missouri,
Attorneys for Appellee.

December, 1962.

CERTIFICATE OF SERVICE.

I, John C. Baumann, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served Appellants in the captioned case with the foregoing Motion to Dismiss the Appeal, by mailing, with proper postage affixed, two copies of said printed Motion to Dismiss the Appeal to appellants' attorneys, Mr. John J. Manning, of Manning & Fousek, 3333 Warwick Boulevard, Kansas City 11, Missouri; Mr.

Bernard Dunau, Attorney at Law, 912 DuPont Circle Building, Washington 6, D. C., and Mr. Bernard Cushman, Attorney at Law, 5025 Wisconsin Ave., N. W., Washington, D. C.

This 17th day of December, 1962.

JOHN C. BAUMANN,
Attorney for Appellee.